UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 616

Case No. 683: SIRAKYAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 4 August 1992, Sirak S. Sirakyan, a staff member of the United Nations, filed an application requesting the Tribunal:

> "... to rescind the decision [to demote the Applicant by one grade] of the Secretary-General and to decide, in line with the recommendation made by the Joint Disciplinary Committee (...), that the disciplinary measure be limited to a written censure by the Secretary-General, as contemplated in rule 110.3(a)(i) of the Staff Rules."

Whereas the Respondent filed his answer on 29 October 1992;

Whereas the Applicant filed written observations on 29 March 1993;

Whereas, on 15 June 1993, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Office at Vienna (UNOV) as a Security Officer, at the M-4 level (Manual Worker category), on 1 September 1979. He served on a series of short-term appointments until 1 February 1980, when his appointment was converted to a fixed-term appointment, due to expire

on 31 July 1980. He served thereafter on a series of fixed-term contracts and was converted from the Manual Worker category to the General Service category with effect from 1 January 1982. He was promoted to the G-4 level, with effect from 1 February 1983 and received a probationary appointment on 1 January 1984 and a permanent appointment, on 1 October 1984.

On 10 September 1990, the Chief, Personnel Service, wrote to the Applicant stating that the Austrian Ministry of Foreign Affairs had reported to UNOV, that the Applicant had engaged in the resale of goods purchased from the Commissary. He also notified the Applicant that this might constitute misconduct, under staff rule 110.1, leading to the institution of disciplinary proceedings. The Applicant was called for an interview on 19 September 1990 and informed that if he so wished, he could be assisted by counsel.

According to the record of the interview, the Applicant "admitted to having sold goods to [name withheld] and had signed a statement to this effect when he had been questioned in October 1989 by the Austrian Customs Office."

On 22 February 1991, the Personnel Officer informed the Applicant that his Commissary privileges were to be withdrawn for one year but that the Director-General reserved the right to apply other disciplinary measures in accordance with chapter X of the Staff Rules.

On 25 February 1991, the Personnel Officer informed the Applicant that the Director General had decided to institute disciplinary proceedings. He was also informed that if he agreed to waive referral to a Joint Disciplinary Committee (JDC), under staff rule 110.4(b), the Administration would seek the Assistant Secretary-General for Office of Human Resources Management's (OHRM) concurrence to limit disciplinary action to a written censure, under staff rule 110.3(e)(i). The Applicant waived his right to have the matter referred to a JDC.

However, on 6 May 1991, the Applicant was informed that the Assistant Secretary-General, OHRM, "had not agreed to the proposals put forward by UNOV Personnel Service ... in view of the seriousness

of [his] offence, and particularly the involvement of the Host Government". The Secretary-General would be prepared to forego referral to a JDC only if the Applicant were "willing to accept a demotion of one grade."

On 8 July 1991, the Applicant, after an exchange of memoranda with the UNOV Personnel Service, informed the Personnel Officer that he would not agree to a demotion of one grade, and asked that his case be referred to a JDC.

The JDC adopted its report on 30 January 1992. Its findings, conclusion and recommendation read as follows:

"FINDINGS

9. The staff member freely admits having violated Commissary Rules in so far as he gave (sold) Commissary goods at no profit to his former colleague. The panel, however, did not obtain conclusive proof concerning the seriousness and gravity of the violations, i.e., neither profit nor the alleged amount of 50,000 Austrian schillings, nor that the staff member knew that his former colleague was engaged in resale of the goods.

10. The contents of the protocol signed by the staff member at the Customs Office are not known to the panel, since no copy of it was provided. The panel therefore knows about it only indirectly, as summarized in other documents. With respect to the allegation of duress made by the staff member, there is at least partial confirmation of pressure being exerted upon him by the authorities to persuade him to sign, as the lawyer who spent some time at the Customs Office with the staff member indicated to the Chairman of the panel, during the above-mentioned telephone conversation, that he had overheard an official telling the staff member that it would be better for him to agree to sign the statement. The lawyer, however, did not hear any clear threat of investigative arrest, although this may have occurred at a time when he was not present. The panel, therefore, is of the opinion that the veiled or indirect threats may have intimidated the staff member to sign a statement which did not fully correspond to the facts, particularly in view of his condition as a naturalized citizen of the Host Country. The panel asked the staff member why he did

not provide the Administration with the correct information of events at the time when he was asked by them to make a statement. He stated that he feared a withdrawal of his previous admission could have led to the re-opening of proceedings against him by the Austrian authorities, and that this fear was fed by the uncertainty created by the lack of further action on the part of those authorities since the original interview at the Customs Office almost a year earlier.

11. The lack of action on the part of the authorities since the original investigation, over two years by now, or even since the last note verbale from the Foreign Ministry to the United Nations Office at Vienna, dated 13 March 1991, could be interpreted as indicating that the case has been dropped. This could be due to a variety of reasons, including lack of sufficient evidence or an evaluation of the case as not deserving any further effort. Yet another factor taken into account by the Panel in reaching its conclusion is the fact that the staff member's violations have already led to his one-year suspension of Commissary privileges.

CONCLUSION AND RECOMMENDATION

12. In view of the absence of conclusive evidence concerning the alleged gravity and seriousness of the violations, the panel recommends that the disciplinary measure be limited to a written censure by the Secretary-General, as contemplated in rule 110.3(a)(i) of the Staff Rules."

On 5 May 1992, the Assistant Secretary-General, OHRM, transmitted to the Applicant a copy of the JDC report and informed the Applicant as follows:

"The Secretary-General has re-examined your case in the light of the Committee's report. He cannot accept the Committee's recommendation because he finds the penalty recommended insufficient for the magnitude of the abuse. ...

..."

He added:

> the Secretary-General has decided to impose upon you the disciplinary measure of demotion by one grade."

On 4 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's contention is:

The penalty imposed by the Respondent for the Applicant's acknowledged violation of the rules is unduly harsh, particularly in view of the recommendation by the JDC.

Whereas the Respondent's principal contention is:

The Secretary-General's decision to demote the Applicant and to refuse to accept the JDC's recommendation of a written censure was a valid exercise of his discretion to impose disciplinary measures.

The Tribunal, having deliberated from 1 November to 3 November 1993, now pronounces the following judgement:

I. The Applicant contests a decision by the Respondent, dated 5 May 1992, demoting the Applicant by one grade. A Joint Disciplinary Committee had previously recommended to the Respondent that the appropriate disciplinary measure consist of a written reprimand, under staff rule 110.3(a)(i). However, the Respondent found the recommended penalty insufficient for the magnitude of the offence because, as the Assistant Secretary-General informed the Applicant on 5 May 1992:

> "(a) there was an admitted serious violation of the Commissary rules as well as UN standards of integrity;
>
> (b) the act was repeated and premeditated, not a sudden yielding to temptation;

(c) the violation was of such a nature as to bring the Organization into disrepute in the host country;

(d) abuse of a privilege conferred on the Organization by a government may lead to the withdrawal of the privilege, to the detriment of other innocent staff members; and

(e) [of] ... the absence of new facts or mitigating circumstances unearthed by the [Joint Disciplinary] Committee."

II. The Tribunal has held repeatedly that the Respondent has broad discretion with respect to the imposition of disciplinary measures in cases involving misconduct by a staff member and that the Tribunal's review of the exercise of such discretion is limited to determining whether it is vitiated by a lack of due process, procedural irregularity, extraneous factors such as bias, mistake of fact or law or arbitrariness. Moreover, the Tribunal has also held consistently that the recommendation of a joint disciplinary committee, being advisory only, is not binding upon the Respondent and need not be accepted by him, when he has a valid basis for rejecting it. (Cf. Judgements No. 424, Ying (1988); No. 425, Bruzual (1988); No. 429, Beyele (1988); No. 479, Caine (1990) and No. 582, Neuman (1992).

III. With these principles in mind, it is clear that the application must fail. For, there is no evidence of any lack of due process, procedural irregularity, mistake of fact or law, or that any extraneous factor was involved in the Respondent's decision. The Applicant admitted during investigations by Austrian Government authorities and by the Respondent that he violated the Commissary rules by acquiring tax exempt items from the Commissary, not for his personal use, but for resale to another person. The Applicant argues that, in the circumstances of his case, the penalty should have been limited to a written censure, as recommended by the Joint Disciplinary Committee. But, as noted above, the Tribunal will not entertain arguments such as those presented by the Applicant which

relate mainly to the inferences that he contends should have been drawn by the Respondent from facts, and to appeals for leniency on various grounds. Nor will the Tribunal attempt to substitute its judgement for that of the Respondent regarding the penalty that is appropriate for the misconduct involved. It is clear from the facts that a reasonable basis existed for the Respondent's decision and that the penalty imposed was not disproportionate. The Tribunal, therefore, need not inquire further.

IV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 3 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary